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No.

In The

Supreme Court of the United States

October Term, 1997

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Petitioners,

vs.

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA") for an employer to subject an employee to an adverse employment action based on that employee's age if age-pejorative perceptions or age stereotyping are not implicated in that adverse action?

2. Is it a violation of the ADEA if an adverse employment action based on age can be justified by an employer's economic considerations?

3. Is it a violation of the ADEA for an employer to subject an employee to an adverse employment action based on the proximity of that employee to a predetermined (mandatory or voluntary) retirement age?

4. If a disparate impact claim is cognizable in an ADEA case, can it be limited to a sub-group of employees consisting of the oldest employees in the applicable pool, *e.g.*, those age 55 and over?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 119 F.3d 102 (2nd Cir. 1997),[1] and is reprinted in the Appendix beginning at 1a.[2] The opinion of the United States District Court for the Eastern District of New York was not reported.

STATEMENT OF JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on July 11, 1997.

This Court has jurisdiction of this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Age Discrimination in Employment Act, 29 U.S.C. § 621-634 (the "ADEA"), the pertinent sections of which are reprinted in the Appendix at 20a-24a. The regulations involved are 14 C.F.R. § 121.383(c) and 29 C.F.R. § 1625.7(d), which are also reprinted in the Appendix at 25a-28a.

STATEMENT OF THE CASE

Pursuant to an asset purchase agreement entered into on July 27, 1991 (the "APA"), Pan American World Airways, Inc.

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1. The Second Circuit's slip opinion is reproduced in the Appendix to this Petition; the official report was not available at the time this Petition was prepared.

2. References followed by an "a" are to page numbers of the Appendix to this Petition.

("Pan Am") agreed to sell, and Delta Airlines, Inc. ("Delta") agreed to acquire, certain of Pan Am's operating assets, equipment and routes. Under the APA, Delta also agreed to hire a number of former Pan Am pilots to fly its equipment, and it authorized Pan Am to identify, interview, screen and retrain the Pan Am pilots for potential hire or re-hire by Delta.

Petitioners, former senior pilots of Pan Am, age 55 and over, allege that Delta violated the ADEA by designing and causing Pan Am to implement a series of pilot selection procedures which minimized the number of the oldest pilots which Delta would have to hire, *i.e.*, those aged 55 and above. Petitioners also allege that the selection criteria and procedures designed by Delta, and utilized by Pan Am, resulted, in fact, in a disproportionately small number of former Pan Am pilots, age 55 and older, actually being hired by Delta.

In granting Delta's motion for summary judgment, the Eastern District of New York issued no written opinion or decision; it made a statement at the conclusion of oral argument to the effect that Delta had merely acquired a "turn key" operation from Pan Am and thus played no role in the actual selection process. (17a). Petitioners moved to renew and reargue, and the District Court adhered to its prior decision. (12a).

The Second Circuit, on July 11, 1997, affirmed the grant of summary judgment, but on different grounds — not discussed or considered by the District Court or raised or briefed on appeal. It found that Delta's ageist directives to Pan Am and its failure to hire large numbers of the oldest Pan Am pilots reflected manpower planning concerns.[3] It further found that such Pan

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3. Some of Delta's directives adduced in the record below were: "... one strategy being offered [is] to reduce the number of senior Pan American personnel who would enter the Delta work force ..."; "we

(Cont'd)

Am pilots if hired, would, within a few years thereafter, have been forced to retire under an age-60 mandatory retirement rule promulgated by the Federal Aviation Administration, 14 C.F.R. § 121.383(c). (25a). The Second Circuit observed that "Delta's concerns about the economics of hiring too many older pilots approaching mandatory retirement were not discriminatory within the meaning of the ADEA, even though their retirements were required by law at a specified age, and not determined by years of service or some other yardstick." (7a). The Second Circuit also found that in such a case Delta's "concern about the economic consequences of employment decisions [did] not constitute age discrimination under the ADEA, even though there may be a correlation with age," citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). (6a).

The Second Circuit also addressed Plaintiffs' disparate impact claim, holding that while it recognized the disparate impact theory of liability under the ADEA, any claim thereunder "must allege a disparate impact on the entire protected group, *i.e.*, workers aged 40 and over" (8a), and it could not be based, as at bar, on showing adverse impact to only a sub-set of victims, *i.e.*, those age 55 and over.

(Cont'd)

[Delta] are faced with a very senior group of pilots coming over in the acquisition"; "Pan Am's pilot workforce is 'contaminated' "; "50% retire 2001 not 1995;" "224" pilots will retire in "5 years"; "As we hire them as pilots, we hope to get 30, 35 years of dedicated, professional, loyal service in the service of Delta Air Lines . . ."; "Can you redo that [list] to key LOS [length of service] not age"; "Those we take with high seniority will work a few years and expect full medical/dental coverage"; "Interview — choose good range of age/seniority/sex."

These statements reveal a clear disinclination on Delta's part to having too large a number of the oldest Pan Am pilots join its job ranks.

For the reasons discussed herein, the Petition for a Writ of Certiorari as to Question Nos. 1-3 should be granted at this time. As to Question No. 4, relating to the applicability of the disparate impact doctrine to an ADEA subclass, *i.e.*, those persons age 55 and over, Petitioners recognize that the threshold issue, whether the so-called disparate impact analysis is cognizable for claims under the ADEA, has not yet been decided by this Court and, for that reason, this Court may wish to decline to address Question No. 4 as being premature. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993). Petitioners respectfully request, however, that if a petition for certiorari on the issue of disparate impact viability in ADEA cases is granted by this Court for another case during the October 1997 Term of this Court, this Court should take up Question No. 4 for certification at that time.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT HAS CONSTRUED THE ADEA, ON SEVERAL SUBSTANTIAL QUESTIONS, IN A WAY THAT CONFLICTS WITH THE *HAZEN* DECISION OF THIS COURT AND WITH OTHER CIRCUITS.

A. The Pre-*Hazen* Status Of The Law.

Prior to *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993), Federal Courts uniformly took a pro-employee view of the ADEA on the issues of: (1) whether age pejorative stereotyping needed to be present in an employer's age-based decision; (2) whether an "economic considerations" defense was available to employers; and (3) whether an employer's decision based on an employee's chronological proximity to a fixed retirement age was actionable:

1) On the issue of whether an adverse employment action based on pejorative or invidious employee stereotyping by the employer was the only type of age discrimination covered by the ADEA, Federal Courts, prior to *Hazen*, found no such limitation. They uniformly held that an adverse employment decision, based on a factor such as an employee's proximity to a predetermined retirement age, was violative of the ADEA without requiring a further showing that the decision was motivated by an employer's inaccurate or stigmatizing stereotypes, or by any other age-pejorative factors. *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984) (a policy which denied severance benefits to certain employees because they were 55 and older, and thus eligible for early retirement benefits, violated the ADEA. The court stated: "We do not require a showing of [the employer's] animus or ill-will toward older people."); *EEOC v. Local 350, Plumbers & Pipefitters*, 982 F.2d 1305 (9th Cir. 1992) (reaffirming *Borden's*), *amended*, 998 F.2d 641 at 648 n.2 (9th Cir. 1993) (affirming prior decision, even after *Hazen*); *EEOC v. California Micro Devices Corp.*, 869 F. Supp. 767, 772 at n.5 (D. Ariz. 1994) ("[B]oth *Borden* and *Local 350* refute Defendant's claim that unless a motivating factor is based upon an inaccurate or stigmatizing stereotype, then there can be no discrimination as a matter of law."); *Tuck v. Henkel Corp.*, 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied*, 113 U.S. 1276 (1992) (employer can violate the ADEA when it terminates employees who reach age 62 [and thereby become eligible for early retirement benefits] "merely" to save on pension benefits. Court did not require proof that age-pejorative factors motivated the termination); *EEOC v. Westinghouse*, 725 F.2d 211, 222-223 and n.7 (3rd Cir. 1983) (eligibility for early retirement benefits so closely related to age that decisions based on same are violative of the ADEA. Proof that age-pejorative factors motivated the termination not required). *See also Sheerin v. New York Division of Substance Abuse Services*, 844 F. Supp. 909, 916 n.11 (N.D.N.Y. 1994) (when an employer's termination

decisions are based on retirement eligibility determined by age and years of service the ADEA is thereby violated).

2) On the issue of whether an adverse employment decision based on an employee's age is violative of the ADEA if it is also motivated by economic considerations, Federal Courts, prior to *Hazen*, held that an economics-based decision, as long as it involved an employee's age, did not qualify as either a reasonable factor other than age ("RFOA")[4] or a bona fide occupational qualification ("BFOQ")[5]; nor did such an economics-based decision otherwise exempt an employer from liability under the ADEA. *EEOC v. City of Altoona*, 723 F.2d 4 (3rd Cir. 1983) (economic considerations cannot be used to justify what is otherwise age discrimination); *EEOC v. Chrysler*, 733 F.2d 1183, 1186 (6th Cir. 1984) (economic considerations as to the application of a pension formula which depends on age is not a reasonable factor other than age); *Smallwood v. United Air Lines*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982) ("Economic considerations cannot be the basis for a BFOQ since precisely those considerations were among the targets of the act."); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 755 (7th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983) (mandatory retirement cannot be justified by cost-considerations).

3) On the issue of whether an adverse employment decision based not on age *per se*, but on a factor analytically intertwined or closely correlated with age, such as an employee's perceived proximity to a predetermined retirement age, is itself violative of the ADEA, Federal Courts, prior to *Hazen*, generally answered

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4. 29 U.S.C. § 623(f)(1).

5. *Ibid.*

this question in the affirmative. *Westinghouse, supra*; *Borden, supra*; *Local 350, supra*; *Tuck, supra*; *Sheerin, supra*. *See also Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125-27 (7th Cir. 1994) (reliance on an age-related factor violates ADEA when age is perfectly correlated with such a factor).

B. The *Hazen* Decision.

In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993), this Court promulgated what may be the most far-reaching decision rendered by it under the ADEA. In *Hazen*, this Court addressed the narrow question of whether an employment decision based not on age *per se*, but, rather, upon a factor related to age, *i.e.*, years of company service, constitutes age discrimination. In answering this question in the negative, this Court in broad language stated:

> We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.

Id. at 609, 113 S. Ct. at 1705.

This Court reached this conclusion based on the finding that the particular age-related factor in question, the employee's proximity to pension vesting, by virtue of having attained a number of years of accumulated company service, was "analytically distinct" from the factor of attaining a certain age. This Court reasoned that since the only requirement for vesting in the pension plan was attaining a number of years of company service, an employee younger than 40, and therefore outside the class of workers protected by the ADEA, could have his pension vest before an older worker who was newly hired. *Id.* at 611-12, 113 S. Ct. at 1707. Accordingly, the employer's

adverse decision, to the extent based on the employee's having accumulated a number of years of company service, could not be the legal equivalent of a decision based on the employee's attaining a certain age. *Id.*

This Court, however, expressly reserved decision in *Hazen* on the related question of whether the employer's basing a decision on an employee's pension status is violative of the ADEA where vesting is determined by the employee's reaching a certain *age*, rather than by attaining a number of years of company service. *Id.* at 613, 113 S. Ct. at 1707-08. This Court also left open the question of whether basing a decision on any age-related factor, where that factor is not analytically distinct from age (and without a further showing that the employer supposed a correlation between that factor and age), could itself be violative of the ADEA. *Id.* at 612-13, 113 S. Ct. at 1707.

Hazen, however, did not end with the discussion of the interplay between age and certain age-related factors. The decision then stated that pejorative perceptions and stereotyping of older workers were the essence of what the ADEA was enacted to prohibit. *Id.* at 619, 113 S. Ct. at 1706. The precise meaning of this assertion has spawned great debate among the Circuits on this and related issues.

C. The Impact Of *Hazen*.

Although the actual *Hazen* decision itself is narrowly based, some Federal Courts have used language in *Hazen* to revisit the issues discussed in Section A, *supra*, and, in so doing, have increasingly given conflicting answers to the questions previously noted — substantially rearranging the ADEA landscape in the process. In particular, the references in *Hazen* to age stereotyping, *i.e.*, that it constitutes the essence of the ADEA, has been extrapolated by some Federal Courts to suggest

that the only type of actionable age discrimination is that which involves age pejorative stereotyping. Other language *Hazen* has been extrapolated to bar an ADEA suit based on any age-related factor, regardless of whether that factor is analytically indistinct from age (unless the employer supposes a correlation between age and that factor).

As a result of *Hazen*, two (2) fundamentally conflicting views as to the ultimate goal of the ADEA have emerged and now appear to be in equipoise:

(1) The broader and more traditional view is that the ADEA was enacted not only to protect older workers against invidious stereotyping, but also to protect them because of their *status* as older workers *per se*, since older workers face unique obstacles late in their careers.[6] The Congressional findings on which the ADEA is based support this position. *See* 29 U.S.C. § 621: Congressional Statement of Findings and Purpose. (20a). Under this view, the ADEA is seen as broad-based protective

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6. *See* Sloan, *Comment: Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 Wis. L. Rev. 507, 521 ("the law's stated purpose [is to] protect older workers. . . ."; "the ADEA's stated policy goal [is] protecting workers from the obstacles they face competing in the labor market late in their careers.") *See also* Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 Fla. L. Rev. 229, 257 (Proponents of a certain view of the age discrimination statutes "would point . . . to indications that the Act was passed, in part, out of concern that unemployed older workers face unique obstacles in finding employment late in their careers"). *See also Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1205 (7th Cir. 1987) (the ADEA was "enacted in response to the problems older workers face in the job market including the obstacles that the long term employee encounters when he/she is suddenly without work. One of the very problems the ADEA intended to address was the likelihood that the employee will be less employable.").

legislation, designed not only to prevent employment decisions based on invidious age stereotyping, but also to safeguard older employees who are vulnerable *as a class*. Thus, employer decisions based on factors such as the higher cost of employing older workers or their proximity to retirement, which are functionally correlated with age, would contravene the ADEA.

(2) The narrower view is that the goal of the ADEA has no such grand purpose; rather, it was enacted solely to preclude employment decisions based on pejorative stereotypes of older workers. The ADEA is thus not seen as extending to employer decisions based on factors which do not implicate age stereotypes, such as factors relating to an employee's proximity to a predetermined retirement age or to the higher cost of employing older workers.[7] Under this view, the ADEA is viewed as having been enacted merely to prevent employers from assuming that merely because an individual has attained a certain age, he or she is no longer able to do the job, or do it as well.

Federal Courts interpreting *Hazen* have reached differing results on a number of subordinate questions which implicate this over-arching issue. To bring uniformity to this area, this Court should decide which of these two broad-based interpretations of *Hazen* is correct. Resolution of this issue goes to the very heart of the ADEA: The existence of inconsistent positions in the various Circuits makes enforcement of the ADEA difficult.

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7. *See Metz v. Transit Mix*, 828 F.2d 1202, 1213 (7th Cir. 1987) (dissenting opinion of Easterbrook, J.); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994); *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1346 (D. N.J. 1996); *Geiger v. AT&T Corp.*, 962 F. Supp. 637, 644 (E.D. Pa. 1987); *Heath v. Massey-Ferguson Parts Corp.*, 869 F. Supp. 1379, 1394 (E.D. Wis. 1994), *rev'd on other grounds, sub nom, Heath v. Varity Corp.*, 71 F.3d 256 (7th Cir. 1995).

Three (3) specific questions for certification, involving this over-arching issue, are drawn for this Court to consider.

1. The Age Stereotyping Question.

This Court stated, in *Hazen*, that "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen*, 507 U.S. at 610, 113 S. Ct. at 1706.

This assertion calls up Question No. 1 for review: Assuming that actionable age discrimination is typified by pejorative characterizations about older people, does that mean, preclusively, that this is the *only* type of age discrimination actionable under the ADEA — *i.e.*, that all other types of age discriminatory conduct, involving non-invidious or neutral views of older persons, are not violative of the ADEA?

Despite the "is the essence" assertion in *Hazen*, there is language in *Hazen* suggesting that pejorative stereotyping of older persons is *not* the only kind of age discrimination violative of the ADEA. This Court stated:

> Finally, we do not consider the *special case* where an employee is about to vest in pension benefits as a result of his age, rather than years of service, . . . and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with . . . benefits that would have vested by virtue of . . . years of service.

Id. at 613, 113 S. Ct. at 1707-08 (cites omitted). (Emphasis added.)

While this language implies that certain types of non-pejorative discrimination remain actionable under the ADEA (those decisions for which age is the decisive factor — regardless of pejorative motivation), some Federal Courts, following *Hazen*, have either ignored this language outright or have failed to recognize its implications. *See Sperling*, *supra*; *Geiger*, *supra*. These Courts have held that, unless pejorative age stereotyping actually informs the employer's decision, no ADEA violation has occurred.

The instant case is an appropriate one for this Court's review of Question No. 1 since it specifically addresses the issue of whether the ADEA requires a showing that the employer's adverse actions, although based on age *per se*, must also implicate some age pejorative stereotyping. At bar, the Second Circuit held that although the evidence adduced by Petitioners showed that Delta declined to hire pilots over age 55, because their ages were in proximity to a fixed retirement age, no age-pejorative stereotyping actually motivated Delta's actions.[8] Thus, the Court found no ADEA violation had occurred.

The case at bar is also appropriate for certification on Question No. 1 because it brings up for review the special case specifically reserved upon by this Court in *Hazen* — *i.e.*, whether it is an ADEA violation to subject an employee to adverse treatment by virtue of that employee reaching a predetermined age (which then results in acquiring a certain status, *i.e.*, vesting

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8. It should be noted that the Second Circuit found that no age-pejorative stereotypes were implicated despite the fact that Delta referred to its potentially older workforce as "contaminated". Moreover, the Circuit found that economic considerations motivated Delta's actions even though there was no showing, let alone an assertion, by Delta that there were significant additional costs associated with hiring pilots 55 and older, as compared to younger pilots.

in a pension plan or triggering a mandatory or voluntary retirement), rather than as a result of attaining a number of years of company service.

Here, Petitioners, in the Second Circuit's view, were refused employment by Delta because their respective ages, *per se*, were perceived as being in relative proximity to a predetermined mandatory retirement age, not because of their having worked a certain number of years at Delta or at Pan Am. Since Petitioners were not hired by Delta because of what their ages were, *per se*, this case should be reviewed by this Court on the specific question of whether an employment decision, based solely on an employee's attaining a certain age, is violative of the ADEA, *i.e.*, whether the presence of age stereotyping in the employers adverse decision is a *sine qua non* for an ADEA violation.

2. The Economic "Safe Harbor" Question.

Question No. 2 for certification by this Court is whether there is a so-called "economic considerations" safe harbor defense which will exempt an employer from liability under either of the ADEA's two statutory exceptions: (1) BFOQ; or (2) RFOA. 29 U.S.C. § 623(f)(1).

Specifically, this Court should decide whether the assertion by the Second Circuit, that "Delta's concern about the economics of hiring too many older pilots approaching mandatory retirement [was] not discriminatory within the meaning of the ADEA, even though there may be a correlation with age", is a proper interpretation of *Hazen*. (6a).

This case is appropriate for addressing Question No. 2 since it is grounded in clear and unambiguous language by the Second Circuit that economic considerations *do* provide a safe harbor

for otherwise illegal age-based actions. The Second Circuit has stated that *Hazen* "made clear that employment decisions driven by factors that are empirically intertwined with age are not discriminatory if they are motivated by '*some* feature other than the employee's age'. Thus, decisions motivated by economic concerns do not violate the ADEA." (Emphasis added, citing *Hazen* at 609). (6a-7a).

There is good reason to doubt the Second Circuit's ruling. Although the Circuit justified its ruling on the grounds of "considerations of the business effects . . .", (7a), no justification for such a broad "economic considerations" safe harbor can be inferred from the language of *Hazen*. *Hazen* merely stated, on this point, that there is "no disparate treatment under the ADEA when the factor motivating the employer is some feature *other than the employee's age*." *Id.* at 609, 113 S. Ct. at 1705. (Emphasis added.) The Second Circuit's interpretation of *Hazen* goes well beyond this statement. Nowhere in *Hazen* is there language that the mere existence of another motivating feature, besides age, is sufficient, by itself, to override an employers age-based motive. In effect, the Second Circuit extended the phrase "some feature other than age" to cover any "economic considerations" faced by an employer. Thus, under the Circuit's approach, an employer may freely discriminate on the basis of age as long as it can show that it derived an economic benefit from its actions.

The Second Circuit's reading, taken at face value, seems to contradict the statement in *Hazen* that "When the employer's decision is *wholly* motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Id.* at 611, 113 S. Ct. at 1706. (Emphasis added). This sentence in *Hazen* means only that the *absence* of age as a factor, *not* the *presence* of economic considerations, saves an employer from being held liable under the ADEA. This sentence also implies

that even if legitimate economic considerations motivated the employer's actions, the employer is still liable under the ADEA if ageist stereotyping is also implicated; *i.e.*, if stigmatizing stereotypes are present, the employer will be liable under the ADEA, since its decision could not have been "*wholly* motivated by factors other than age". (*Id.*, emphasis added).

Petitioners submit that the Second Circuit's reliance on an economic considerations "safe harbor" defense is unsupported by *Hazen*. Almost every adverse employment action, even those based on an employer's pejorative perceptions of an employee's performance, can be traceable (to a greater or lesser degree) to some economic considerations by the employer. Thus, the Second Circuit's "economic considerations" holding does far more than provide a safe harbor; it provides an all-purpose license for employers to eviscerate the protective scope of the ADEA.

That an economic considerations "safe harbor" was never contemplated by the ADEA is apparent by examining Section 623(f)(2) of the ADEA. (22a-23a). That Section provides that an employer may take into account the increased costs of providing certain benefits to older employees by adjusting the value downward of these benefits. That Section provides, however, only a narrow exception: While it allows an employer to cut fringe benefit costs, it expressly forbids an employer from denying or terminating employment altogether based on such cost-saving considerations. In fact, Section 623(f)(2) was included in the amendments to the ADEA in order to encourage and promote employers to hire or retain older employees — not to give employers an excuse for discharging them. The legislative history of the ADEA states:

> This exception serves to emphasize the primary purpose of the [ADEA] — hiring

> older workers — by permitting employment without necessarily including such workers in employee benefit plans. The specific exception . . . is considered vita [sic] to the legislation.

House Report No. 805, 90th Cong., 1st Sess., *reprinted in* USSCAN 2213, 2217 (1967).[9] If Congress had intended to allow a broad economic "safe harbor" to apply to hiring and termination decisions, as found by the Second Circuit, there would be no need for Section 623(f)(2) in the first place. Thus, by allowing age-based economic considerations to apply only in the limited and specific area of providing employee benefits, it is clear Congress intended to prohibit employers from denying employment altogether based on such factors.

Two conclusions emerge from the Second Circuit's decision on this issue: (1) To the extent that Delta's action not to hire Petitioners was based on the increased costs of providing for their pension benefits, as stated by the Second Circuit,[10] Delta's actions run counter to the limited exception set forth in Section 623(f) of the ADEA; (2) The failure of Congress to specifically provide for a general economic "safe harbor" defense reflects its intent to encourage the employment and retention of older workers generally *without* regard to their greater retention costs.

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9. *See also* Sen. Rep. No. 95-493, 95th Cong., 2d Sess., *reprinted in* 1978 USSCAN 504, 512 ("The purpose of this exception [Section 623(f)(2)] was to facilitate the hiring of older employers by permitting their employment without necessarily providing equal benefits under employee benefit plans.").

10. The Second Circuit stated: "The evidence [proffered by the Plaintiffs] might support an inference that Delta was reluctant to hire pilots who would shortly be disqualified from piloting and might begin drawing pension benefits." (6a).

Contrary to the Second Circuit's finding in the instant case, this economic justification defense has been given short shrift in other ADEA cases. *See Altoona, supra*; *Chrysler, supra*; *Smallwood, supra*. Accordingly, this conflict in the Circuits, as well as the Second Circuit's strained interpretation of *Hazen* on this point, should be resolved by this Court at this time through certification of Question No. 2.

3. The Proximity to Retirement Question.

In addition to the age stereotyping and economic "safe harbor" questions, discussed, *supra*, there is a need for this Court to consider Question No. 3, *i.e.*, whether it is permissible under the ADEA to subject an employee to adverse action because that employee is in mere proximity to a fixed or predetermined retirement age. This question is related to both Question Nos. 1 and 2, but it involves a separate issue which implicates an employer acting on the basis of an employee's future age-based status.

The Second Circuit, in answering this Question No. 3, held that an employer has the unfettered right to reach into the future and refuse to hire and/or fire an employee because of the employee's age. In particular, the Circuit held that Delta was justified in rejecting Petitioners because of "the inefficiency and expense of hiring large numbers of [older pilots] *on the verge of mandatory retirement*." (7a). (Emphasis added).

In so holding, the Second Circuit removed the ADEA protection from employees who are adversely treated because of their proximity to a predetermined mandatory or voluntary retirement age. Since any employee, at or around age 55, or even younger, can he viewed as being more or less on the verge

of a retirement at age 60, the Circuit's interpretation of *Hazen* would enable an employer to "jump the gun" by dismissing or refusing to hire an older employee who is several years away from actual retirement, simply because that employee is perceived to be "on the verge of retirement".[11]

This holding has more troubling implications than the "economic considerations" defense raised in Question No. 2: In the latter case, the employer is at least positing a countervailing or non-age based rationale for its actions. In taking adverse action on the grounds of an employee's chronological proximity to fixed retirement age, the employer is acting solely on the factor of the employee's age.

The Circuit's holding seems to run contrary to the ADEA's specific prohibition against the mandatory retirement of older workers. 29 U.S C. § 623(f)(2). The holding would also seem to run counter to decisions from other Federal Courts which have held that where an employer's actions have the effect of forcing the retirement of its employees, the ADEA is violated. *Altoona*, *supra*; *Tuck*, *supra*; *Sheerin*, *supra*.

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11. Indeed, in expressing its statement of findings and purpose for the enactment of the ADEA, Congress pointedly found that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice, . . ." It is submitted that the Second Circuit's holding that an employee age 55 is "on the verge of mandatory retirement," when retirement is five (5) years away, will encourage employers in "the setting of arbitrary age limits." 29 U.S.C. § 621(a)(2). (20a).

See also legislation history of the ADEA Senate Report No. 95-493, 94th Cong., 2d Sess. (1978), *reprinted in* 1978 USSCAN 804, 806. ("For capable, older workers the retirement decision should be an individual option. Maximum freedom of choice should be given to employees in deciding when to retire. . . .").

Although many Federal Courts have found that taking into account an employee's proximity to retirement is prohibited by the ADEA, *Westinghouse*, *supra*; *Borden*, *supra*; *Local 350*, *supra*; *Tuck*, *supra*; *Sheerin*, *supra*; other Federal Courts have found to the contrary. *See Sperling*, *supra*; *Geiger*, *supra*; *Heath*, *supra*. Thus, there is a clear split of authority on Question No. 3, warranting review of same by this Court.

The extent of the confusion in the Federal Courts on this issue is apparent upon examining *Johnson v. State of New York*, 49 F.3d 75 (2nd Cir. 1995). This case, decided by the Second Circuit less than two years before the instant case, contains an analysis and holding completely contradictory to the instant case. In *Johnson*, the plaintiff claimed that the State of New York had violated the ADEA when it adopted the Federal Air National Guard's mandatory age 60 retirement policy for security personnel at an Air National Guard base. The State argued that its policy was not motivated by age-based stereotypes, but rather was based on various non-age-based related reasons, and, as such, did not violate the ADEA under *Hazen Paper*.[12] The Circuit rejected this reasoning:

> The State's reliance on *Hazen Paper* is unavailing. The flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement age 60 . . . is not merely *correlated* with age; unlike *Hazen Paper*, the employer's decision here

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12. Three age-neutral reasons were given by the State: (1) to ensure security guards are "fully trained in accordance with current standards of military practice"; (2) to insure that "guards are familiar with military protocol and the equipment they are assigned to protect"; and (3) to assure that "guards are available to accompany their unit in the event the unit is activated." *Id.* at 77.

> in fact *implements* an age-based criterion. Regardless of the state's reasons for requiring that certain of its civilian employees maintaining memberships, there can be no doubt that Johnson's age actually played a role . . . and had a "determinative influence" on the decision to terminate his employment . . . In this case, age and termination are inextricably linked. The sole reason for Johnson's loss of dual status and his consequent termination was age.

Id. at 79-80 (emphasis in original).

Thus, the Second Circuit held, in *Johnson*, that a policy which, in effect, required the retirement of persons age 60 and over was a *per se* violation of the ADEA without the need for further proof that any age-based stereotype or other age-pejorative factor actually motivated the employer's decision. Furthermore, the Circuits statement, "Regardless of the state's reasons . . . ," suggests that there is no reason, cost-based or otherwise, behind which an employer may hide.[13]

The facts of *Johnson* are similar to those of the instant case. In both cases, plaintiffs proffered evidence that the employer had a policy of not hiring employees who were of a certain age or older because of their perceived proximity to a fixed retirement age. Thus, it seems that the Second Circuit itself is confused about how to apply *Hazen*.

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13. The Circuit did not address the question of the BFOQ exception in the case since the State explicitly disavowed reliance on the BFOQ defense. *Id.* at 80. Thus, under *Johnson*, if economic considerations could excuse age-based employment decisions in any respect, those reasons would have to qualify as a BFOQ.

In sum, it is submitted that the Second Circuit's interpretations of *Hazen*, (a) in requiring the presence of age stereotyping; (b) in allowing an economic considerations defense; and (c) in finding terminations based on proximity to retirement to be non-actionable, are in error. Moreover, as there is a substantial split in the Circuits as to Question Nos. 1-3, the Petition for a Writ of Certiorari should be granted.

II.

THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER A DISPARATE IMPACT CLAIM IS VIABLE IN AN ADEA SUB-GROUP CASE.

On the issue of whether claims of age discrimination based on the disparate impact theory are cognizable under the ADEA, most Federal Courts have held that the disparate impact doctrine is alive and well. *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1982), *cert. denied*, 451 U.S. 945 (1981); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983). This Court, however, has not decided this issue.

The Second Circuit has held in the instant case that a disparate impact claim, if viable under the ADEA, cannot, however, be based upon evidence that a particular policy has a disparate impact on only a segment of a protected group, *e.g.*, those over age 55, relying on *Lowe v. Commack Union Free School District*, 886 F.2d 1364 (2nd Cir. 1989). Thus, although it has recognized the disparate impact theory under the ADEA, it has limited the theory to "the entire protected group, *i.e.*, workers aged 40 and over." (8a).

The Second Circuit's holding is in direct conflict with: (a) those Circuits which recognize the disparate impact theory

without any age subset limitation; and with (b) those Circuits which reject the disparate impact theory outright.

Since the Ninth Circuit has accepted age-banding in disparate impact cases, *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) (disparate impact analysis allowed with a 55 and over age-break), a direct conflict is presented with that Circuit which, in and of itself, warrants review of this question by this Court.

There are other reasons why this issue should be reviewed: It is clear that age-banding is generally accepted by various Federal Courts in ADEA cases under the disparate treatment theory. The Third Circuit approved the use of age-bands of 40 and 45 in *Blum v. Witco*, 829 F.2d 367 (3rd Cir. 1987). In *Barnes v. GenCorp.*, 896 F.2d 1457 (6th Cir. 1990), the Sixth Circuit allowed age-bands at 48, 52, 55 and 60. Other cases using age-bands include *Mistretta v. Sandia*, 15 F.E.P. 1690 (D.N.M. 1977), *aff'd sub nom, EEOC v. Sandia*, 639 F.2d 600 (10th Cir. 1980) (comparisons made at age-bands 55 and 60), *Marshall v. Sun Oil*, 605 F.2d 1331 (5th Cir. 1979) (age-bands at 40, 50 and 60), and *Polstroff v. Fletcher*, 452 F. Supp. 17 (D. Al. 1978) (comparisons made at age-band of 55).

The Civil Rights Act of 1991, ("CRA"), Pub. L. 102-166, was signed into law on November 21, 1991, two (2) years after *Lowe v. Commack Union, supra*, was decided by the Second Circuit. Although the court in *Lowe* held that a disparate impact theory is not viable in an ADEA sub-set action, *Lowe* ignored the fact that the CRA was intended to apply to *all* laws modelled after Title VII (The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.*), including the ADEA.

Because the Federal Equal Employment Opportunity Commission ("EEOC") has recognized that the disparate impact

theory applies fully to the ADEA, 29 C.F.R. § 1625.7(d), (26a-28a), this Court may wish to consult with the EEOC as to whether the question of ADEA sub-setting should now be certified to this Court.

Since disparate impact claims brought under the ADEA should be treated in the same manner as under Title VII, as amended, and since the disparate impact theory *is* a clearly viable theory for Title VII sub-set claims, it is submitted that this theory should be equally viable to ADEA sub-set claims: Congress could not have intended for neutral employment practices to be unlawful under the ADEA only if they discriminated against *every* employee age 40 and over in the relevant job pool. Yet the Second Circuit, in *Lowe* and in the instant case, has taken the incongruous position that an employer who discriminates against only a certain age segment of the protected class (even where these employees are the oldest) is not liable. This enables an employer to discriminate against those aged 50 and over as long as it spares those age 40-49 from discriminatory treatment. This result is plainly illogical.

Although Congress established age 40 and over as the group to be protected by the ADEA, nothing in it suggests that a facially neutral employment practice should be found unlawful only if it discriminates across the board against *every* applicant or employee age 40 and over in the relevant job pool. Just as an employer may be found to disparately treat employees over a certain age, *i.e.*, 50 or 60, a facially neutral employment practice may also have an adverse impact on that class of employees.

The conflict between the Circuits as to whether a disparate impact claim is viable in an ADEA sub-group case will continue to cause uncertainty in the administration of the ADEA. In particular, the fate of employees age 55 and over, or those with five (5) years or fewer left of gainful employment, who may be

terminated because they are "on the verge of retirement," should not be left to such uncertainty.

If the holding in the instant case is permitted to stand, confusion in this area will continue. Employers will seek to terminate employees nearing a fixed retirement age by articulating a facially neutral policy, after the fact, as a justification for their actions. The application of the disparate impact theory should be applied consistently for all ADEA litigants; it should not depend on the Circuit in which the parties are found.

This Court should grant certiorari to resolve a conflict in the Circuits as to whether a disparate impact claim is viable in an ADEA sub-group case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted in all respects.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JULY 11, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 175 — August Term, 1996

(Argued: November 27, 1996 Decided: July 11, 1997)

Docket No. 96-7110

DAVID M. CRILEY; RONALD G. FITCH; DAVID E. JONES; CONSTANTINE G. VLAHAKIS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—v.—

DELTA AIR LINES, INC.; AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Defendants-Appellees.

Before:

WALKER and LEVAL, *Circuit Judges,*
and STANTON, *District Judge.*[1]

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1. The Honorable Louis L. Stanton, United States District Judge for the Southern District of New York, sitting by designation.

Appendix A

Appeal from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge).* The district court granted summary judgment to defendant Delta Airlines, Inc. upon a finding that Delta did not practice age discrimination in its hiring of pilots when it took over shuttle routes from Pan American World Airways, Inc. The plaintiffs, all of whom were Pan Am pilots aged 55 and older at the time of the shuttle takeover, claim they were not hired because of their age.

Affirmed.

LEONARD N. FLAMM, New York, N.Y., (Norman Mednick and Maria D. Beckman, New York, N.Y., On the Brief), for *Appellants.*

WILLIAM H. BOICE, Atlanta, GA., (Stephen E. Hudson, Kilpatrick & Cody, Atlanta, GA., On the Brief; Stuart H. Bompey and Ira G. Rosenstein, Orrick, Herrington & Sutcliffe, New York, N.Y., Of Counsel), for *Appellees.*

PER CURIAM:

Plaintiffs, who are former pilots of Pan Am World Airways, Inc., appeal the summary dismissal of their claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"). The pilots contend that when the defendant Delta Air Lines, Inc. took over the faltering Pan Am shuttle Delta's hiring selection of Pan Am pilots was age biased. The United States District Court for the Eastern District of New York (Jack

B. Weinstein, *Judge)* granted summary judgment to defendants, finding that, after two years of discovery, there was no showing that Delta practiced age discrimination.[2]

The plaintiffs were all aged 55 and older at the time of the shuttle transfer. They allege that, in hiring shuttle pilots from Pan Am, Delta used a seniority system that disadvantaged senior pilots and that it deliberately withheld seniority information in order to discourage older pilots from qualifying for the shuttle jobs. Plaintiffs also claim that Judge Weinstein should have recused himself from their case because his previous decisions evidence age bias. We find no basis for recusal and agree with Judge Weinstein that the record before the district court raised no genuine factual issue of discrimination on Delta's part. We therefore affirm.

The essential underlying facts are as follows. In early 1991, Pan Am filed for bankruptcy. On July 27, 1991, Pan Am and Delta entered into an Asset Purchase Agreement ("APA"), through which Pan Am sold to Delta certain assets, including Pan Am's shuttle routes and the Airbus A-310 and Boeing 727 aircraft used on those routes. Under the terms of the APA, Delta promised to hire at least 700 Pan Am pilots to fly the shuttle routes. The APA provided that those pilots "must be fully trained and currently qualified in the Boeing 727 or Airbus A-310 categories . . . as of November 1, 1991" and would be hired in "seniority order by category." The APA further stipulated that

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2. The pilots raise no substantive claim against the other named defendant, Air Line Pilots Association (the pilots' union). According to the complaint, the union was joined as a party because of its "interest in the subject matter of this action, and in order that complete and effective disposition of the Plaintiff's claims can be made herein." *See* Fed. R. Civ. P. 19(a).

"[a]ny training of [Pan Am's] pilots required to make them fully trained and currently qualified in the applicable Airbus A-310 or Boeing 727 categories . . . shall be the responsibility of and undertaken at the expense of [Pan Am]." The Bankruptcy Court approved the APA in August 1991. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y. 1994). Delta ultimately hired 774 former Pan Am pilots.

None of the plaintiff-pilots were qualified to fly the shuttle planes as of November 1991. They allege, however, that their lack of qualification was the result of the discriminatory way the shuttle jobs, and the necessary training, were offered. They allege that the seniority system adopted under the APA for the shuttle jobs and the manner in which information about that system was provided were calculated to discourage older pilots from switching from Pan Am to Delta. Delta explains that, as required by the APA, Pan Am pilots who were qualified to fly the A-310s and 727s as of November 1 were hired in the order of their overall seniority as ranked by Pan Am. Plaintiffs, however, allege that while the seniority system used may be clear now, at the time Pan Am pilots had to decide whether to retrain, Delta deliberately fostered confusion about how seniority would be calculated under the APA in order to discourage senior, older, Pan Am pilots from transferring to Delta.

According to plaintiffs, pilots were asked to make snap decisions that would affect their futures without information about how the choice to move to Delta would affect salary, seniority status, and retirement benefits, and with the understanding that acceptance of the training would involve forfeiture of the chance for continued employment with Pan Am. There is no evidence that younger pilots were offered training in any more congenial manner. Plaintiffs argue, however, that

because older, more senior, pilots had more to lose, they would be unlikely to make the jump, which was the effect Delta hoped to produce.

Plaintiffs maintain that Pan Am pilots should have been hired according to "simple system-wide seniority," the method advocated by the pilots' union after the APA was signed. Under this system, pilots would have been eligible for hiring strictly on the basis of their total seniority with Pan Am without regard to their qualification to fly the Airbus and 727 airplanes Delta was taking over. According to plaintiffs, hiring on an overall seniority basis would have been a rational decision, because pilots are routinely retrained on different aircraft and the training needed by most of the senior pilots was minimal, since the planes they flew were larger and more complicated than the shuttle planes.

Under the ADEA, once plaintiffs have satisfied the minimal requirements of the prima facie case and the defendant has articulated a non-discriminatory reason for the challenged action, plaintiffs must prove the real reason for the challenged action was age. *See Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994). To defeat a properly supported motion for summary judgment in an age discrimination case, plaintiffs must "show that there is a material issue of fact as to whether (1) the employer's asserted reason for [the challenged action] is false or unworthy of belief *and* (2) more likely than not the employee's age was the real reason." *Id.* at 108-09.

Plaintiffs contend that Delta's real reason for rejecting overall seniority and instituting the seniority plan provided by the APA (and the reason plaintiffs allegedly did not receive clear information about that plan) was age bias. Delta, however, has

offered unrebutted age-neutral explanations for its decision to reject the "system-wide seniority transfer" proposal promoted by plaintiffs. First, Delta asserts that it was reasonably concerned to hire a pilot force capable of immediately staffing the shuttle at the point that Delta took it over, which naturally entailed hiring pilots who were currently qualified to fly those planes. Moreover, Delta asserts, and plaintiffs have not effectively contradicted, that the use of system-wide seniority, irrespective of qualification for the equipment, would have required Delta to hire more pilots than it needed.

Plaintiffs seek to rebut Delta's age-neutral proofs by pointing to a variety of unconnected fragments of evidence in which Delta personnel might be understood to be making reference to age. None of the statements cited by plaintiffs reflect any age-based stereotype or belief that older pilots are less competent than younger ones. Instead, these references appear in the context of efficiency concerns raised by the Federal Aviation Administration's rule that commercial pilots cannot fly passenger jets past age 60. *See* 14 C.F.R. § 121.383(c).

At most, some of the statements suggest a concern about the economics of hiring pilots who were approaching the mandatory retirement age. The evidence might support an inference that Delta was reluctant to hire pilots who would shortly be disqualified from piloting and might begin drawing pension benefits. Under *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12, 113 S. Ct. 1701, 1706-07 (1993), an employer's concern about the economic consequences of employment decisions does not constitute age discrimination under the ADEA, even though there may be a correlation with age. *Hazen* made clear that employment decisions driven by factors that are empirically intertwined with age are not discriminatory so

long as they are motivated by "some feature other than the employee's age." *Id.* at 609, 113 S. Ct. at 1705. Thus, decisions motivated by economic concerns do not violate the ADEA.

The concern expressed in the comments plaintiffs cite is the inefficiency and expense of hiring large numbers of pilots on the verge of mandatory retirement. *Hazen* left open the question whether an employment action based on an employee's retirement status might violate the ADEA if that retirement status was a direct function of age (rather than years of service). *Id.* at 613, 113 S. Ct. at 1707-08. Because the Pan Am pilots were subject to a mandatory retirement *age,* their case is arguably beyond *Hazen's* narrow holding. We conclude, nonetheless, that Delta's concerns about the economics of hiring pilots approaching mandatory retirement were not discriminatory within the meaning of the ADEA, even though their retirement was required by law at a specified age, and not determined by years of service or some other yardstick. "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 610, 113 S. Ct. at 1706. To the extent the comments cited by plaintiffs implicate age at all, they express considerations of the business effects of the federally mandated retirement age, not assumptions about employees' abilities based on their age. On the reasoning of *Hazen,* considering and acting on such factors is not age discrimination.

Plaintiffs also claim that Delta's hiring plan was discriminatory, even without ageist intent, because of its "disparate impact" on Pan Am pilots aged 55 and over. Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, *Hazen,* 507 U.S.

at 610, 113 S. Ct. at 1701, in our circuit, we have recognized such an action. *District Council 37 v. New York City Dep't of Parks and Recreation*, __ F.3d __, 1997 WL 245189 at *4 (2d Cir. May 14, 1997), citing *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 115 (2d Cir. 1992). We have held, however, that it must allege a disparate impact on the entire protected group, *i.e.*, workers aged 40 and over. *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1372-73 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026, 110 S. Ct. 1470 (1990). Plaintiffs acknowledge that 94.1 % of the pilots Delta hired were aged 40 and older and that the hiring scheme had no negative impact on the overall group of Pan Am pilots aged 40 and older. Under *Lowe*, then, plaintiffs' disparate impact claim cannot survive.

Plaintiffs' other asserted bases for finding age discrimination are strained and without merit. Judge Weinstein was correct to dismiss them on the motion for summary judgment. *See Woroski*, 31 F.3d at 109-10, *("[S]ome* evidence is not sufficient to withstand a properly supported motion for summary judgment; a plaintiff opposing such a motion must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not the employee's age was the real reason" for the challenged action.). Plaintiffs are correct that it is *theoretically* possible that in negotiating the APA, Delta could have exacted from Pan Am a promise to train and send only younger pilots in preference to older ones, giving rise to an ADEA claim against Delta. To the extent that the district judge relied upon the bankruptcy court's approval of the contract as a reason to exonerate Delta of any discrimination liability, such reliance appears misplaced. Nevertheless plaintiffs have brought insufficient evidence to sustain a reasonable inference of

discrimination on Delta's part in its negotiation of the contract's terms.

Finally, plaintiffs argue that Judge Weinstein should have recused himself because his statements while trying other ADEA cases indicate that he harbors age bias. The Supreme Court has cautioned that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, (1994). In any event, we find no indication in plaintiffs' submissions of any bias on Judge Weinstein's part.

In summary, we agree with the core of the district court's holding that plaintiffs have produced insufficient evidence to give rise to a material issue of fact regarding age discrimination. The judgment is affirmed.

APPENDIX B — EXCERPTED TRANSCRIPT OF MOTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 13, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 93-1666, 92-1049, 93-853

United States Courthouse
Brooklyn, New York

DAVID CRILEY, WALTER DUKE, JR., EDWARD SPELLACY JR., et al,

Plaintiffs,

-against-

DELTA AIRLINES, ALPHA, et al.,

Defendants.

December 13, 1995
11:00 o'clock a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

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Appendix B

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Proceedings recorded by mechanical stenography, transcript produced by computer.

* * *

[22] . . . evidence of age discrimination, and

Lastly, when pilots did request information from Delta to assist them in whether or not to make training decisions, Delta said we don't have, which in fact that they did. They knew what was going on.

THE COURT: All right, the motion for summary judgment to dismiss against all defendants is granted. I think they are now entitled to cost and disbursements, since they had additional unnecessary expenses in these proceedings. The costs and disbursements on the motion and in the action. Submit a judgment and let's take this up on appeal and let's get it set one way or the other. I can't do anything for you. I'm convinced there is nothing to this case whatsoever against Delta.

MR. BOICE: Thank you, your Honor.

THE COURT: Next case.

Try to agree on the terms and give me the judgment today or tomorrow.

THE CLERK: Civil cause for motion, Duke versus Alpha.

MR. ABRAMS: At our conference in October your Honor granted the motion to dismissal the claims against defendant Alpha in these cases, except the duty of fair representation.

THE COURT: As I understood from some of the papers, and I do not want to break train of thought, the individual . . .

* * *

APPENDIX C — EXCERPTED TRANSCRIPT OF CIVIL CAUSE FOR MOTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED OCTOBER 26, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-93-1666
(JBW)

United States Courthouse
Brooklyn, New York

DAVID CRILEY, et al., :

Plaintiffs,

-against-

DELTA AIRLINES, et al.,

Defendant.

October 26, 1995
11:00 o'clock a.m.

TRANSCRIPT OF CIVIL CAUSE FOR MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

Appendix C

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript [2] produced by CAT.

THE CLERK: Civil cause for motion, David Criley et al versus Delta Airlines, et al.

Appendix C

Counsel, note your appearance, please.

MR. BOICE: Bill Boice for Delta Airlines. With me is Steve Hudson with the same firm, for Delta.

MR. CIANTRA: Thomas Ciantra for the Airline Pilots Association which is a defendant pursuant to Rule 19 in this case.

MR. FLAMM: Plaintiffs' attorneys: Leonard Flamm, appearing with Norman Mednick.

THE COURT: Who are these other people in the courtroom?

MR. FLAMM: Persons in the courtroom, Ed Spellacy and Ed Wass, members of the plaintiffs.

THE COURT: Go ahead.

MR. BOICE: Bill Boice. I am representing Defendant Delta Airlines in this case.

We have pending before the Court a motion for summary judgment dismissing the claims of the named plaintiffs in this action. The Court, I think, is familiar with the basic transaction that is involved in this lawsuit, but if I may hit a couple of the highlights to refresh the recollection.

This case arises out of Delta's acquisition of certain assets of Pan Am in 1991. Specifically, Delta . . .

Appendix C

* * *

[47] MR. BOICE: There also is a motion to certify this as a Rule 23 class for state law claims. Again, that would follow these individual named plaintiffs. We have to get to the point that there are claims here that survive, and then we look to see whether people are similarly situated under both cases.

THE COURT: Yes.

All right.

The motion to dismiss is granted.

The contract involved was approved by the bankruptcy Court and was enforceable pursuant to its terms. This was essentially a turn-key operation. Pan Am turned over aircraft and pilots authorized and trained to operate those aircraft. There's no showing of any intention to discriminate on the basis of age.

This is a very sad case for those fine pilots who did not obtain jobs with Delta, particularly since Pan Am was not able to continue in operation and provide the jobs that they were well trained and capable of doing for Pan Am.

The issue is raised that this hearing by the Court were for its own understanding of the total situation. The affidavits that the plaintiffs wish to submit are irrelevant. The motion for summary judgment, however, the Court will be happy to receive them for purposes of appeal. You have ten days to supplement the record. Ten days to supplement the [48] record, and the defendants will have five days thereafter.

MR. FLAMM: That's on the issue we discussed?

THE COURT: Whatever issue you wish.

MR. FLAMM: Thank you.

THE COURT: Including that, and the defendants will have five days thereafter to supplement.

The defendants will submit a judgment and order of dismissal five days after it submits its affidavits.

You will show it to counsel for the defendants so they can object as to form and submit a counter order.

Do you want to amend the complaint?

MR. FLAMM: Yes, your Honor.

THE COURT: You want time to amend?

MR. FLAMM: We did move to.

THE COURT: That's granted.

Do you wish a further amendment?

MR. FLAMM: I appreciate the offer. If you would grant that amendment for the purposes of the record.

THE COURT: Yes, that's granted, but then there won't be any further amendment. We can bring the case to a close.

As far as the Allied Pilots Association, it is in a position derivatively, and if the action is dismissed against Delta, there's no point at all in keeping the Airline Pilots Association in the case.

I will not grant costs and disbursements so it really . . .

* * *

APPENDIX D — RELEVANT STATUTES AND REGULATIONS

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 29 U.S.C. § 621, *et seq.*

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that —

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub. L. 90-202, § 2, Dec. 15, 1967, 81 Stat. 602.)

* * *

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his

employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization —

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

* * *

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years

of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub.L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; Pub.L. 95-256, § 3(a), (b)(3), Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg.Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 98-459, Title VIII, § 802(c)(1), Oct. 9, 1984, 98 Stat. 1792.)

Appendix D

14 C.F.R. § 121.383(c)

CODE OF FEDERAL REGULATIONS
TITLE 14 — AERONAUTICS AND SPACE
CHAPTER I — FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION SUBCHAPTER G — AIR CARRIERS AND OPERATORS FOR COMPENSATION OR HIRE: CERTIFICATION AND OPERATIONS
PART 121 — OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS
SUBPART M — AIRMAN AND CREWMEMBER REQUIREMENTS
Current through September 16, 1997; 62 FR 48498

§ 121.383 Airman: Limitations on use of services.

(a) No certificate holder may use any person as an airman nor may any person serve as an airman unless that person —

(1) Holds an appropriate current airman certificate issued by the FAA;

(2) Has any required appropriate current airman and medical certificates in his possession while engaged in operations under this part; and

(3) Is otherwise qualified for the operation for which he is to be used.

(b) Each airman covered by paragraph

(a) (2) of this section shall present either or both certificates for inspection upon the request of the Administrator.

(c) No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

[Doc. No. 6258, 29 FR 19212, Dec. 31, 1964, as amended by Amdt. 121-144, 43 FR 22646, May 25, 1978]

29 C.F.R. § 1625.7(D)

CODE OF FEDERAL REGULATIONS
TITLE 29 — LABOR
SUBTITLE B — REGULATIONS RELATING TO LABOR
CHAPTER XIV — EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1625 — AGE DISCRIMINATION IN EMPLOYMENT ACT
SUBPART A — INTERPRETATIONS
Current through September 16, 1997; 62 FR 48498

§ 1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f) (1) of the Act provides that * * * it shall not be unlawful for an employer, employment agency, or labor

organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plants which qualify for the section 4(f) (2) exception to the Act.